

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

NIELSEN ELECTRONICS INSTITUTE, :  
:   
Plaintiff, :   
:   
v. : Civil Action No. 99-285-JJF   
:   
STUDENT FINANCE CORPORATION :   
and ANDREW YAO, :   
:   
Defendants. :

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Attorneys for Defendants.

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**MEMORANDUM OPINION**

January 18, 2001

Wilmington, Delaware

**Farnan, District Judge.**

Pending before the Court is a Motion For Reargument With Respect To Paragraph 2 Of The Court's September 29, 2000 Order (D.I. 96) filed by Defendant, Student Finance Corporation ("Student Finance"). In the Court's September 29, 2000 Order, the Court granted Student Finance's Motion To Dismiss (D.I. 60) the RICO and fraud counts of the Amended Complaint and denied as moot Student Finance's Motion To Compel Production Of Documents (D.I. 68). By the instant Motion, Student Finance seeks to reargue that portion of the Order pertaining to the Motion To Compel Production Of Documents. Specifically, Student Finance contends that the documents it sought by the Motion To Compel are relevant to Count One of the Amended Complaint and Student Finance's Counterclaim, both of which raise breach of contract claims.

In response to Student Finance's Motion For Reargument, Plaintiff, Nielsen's Inc. ("Nielsen's"), has filed an Answer reasserting its position that the documents sought by Student Finance are privileged work product and contending that any evidentiary value the documents might have had is mooted by the Court's September 29, 2000 Order dismissing the RICO and fraud counts of the Amended Complaint. Assuming that the Court misapprehended the continued relevance of the documents to the breach of contract issues remaining to be litigated in this case,

the Court will grant Student Finance's Motion For Reargument to consider whether the documents sought by Student Finance's Motion To Compel are protected by the work product doctrine. See Max's Seafood Café v. Max Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (recognizing that motion for reconsideration may be granted to correct error of law or fact). For the reasons set forth below, the Court concludes that the documents sought by Student Finance's Motion To Compel are protected from disclosure by the work product doctrine, and therefore, the Court will deny Student Finance's Motion to Compel.

#### **BACKGROUND**

By way of brief factual background, it appears that the parties agree that the documents sought by the Motion To Compel were prepared by Nielsen's counsel and contain the opinions and analysis of Nielsen's counsel regarding the claims in this case. Further, it is undisputed that these documents were disclosed by Nielsen to its outside accountant of 29 years, Edward H. Baker, CPA. (Baker Dep. at 9). Mr. Baker was responsible for preparing Nielsen's financial statements and conducting Nielsen's annual audit. He was aware of Nielsen's litigation with Student Finance and requested information in connection with his audit for purposes of determining the impact of the litigation on Nielsen. (Baker Dep. at 178). Mr. Baker was given a file to review which contained, among other things, the documents at issue. (Baker

Dep. 181). Mr. Baker testified at a deposition that he did not intend to change Nielsen's accounting treatment until the litigation in this case was resolved. (Baker Dep. at 168).

### **DISCUSSION**

The issue presented by the instant Motion is whether Nielsen waived any work product protection that may have applied to the documents at issue by disclosing them to its outside accountant.<sup>1</sup> In Westinghouse Electronic Corp. v. Republic of the Philippines, 951 F.2d 1414, 1428 (3d Cir. 1991), the Court of Appeals for the Third Circuit set forth the principles governing this issue.

The work product doctrine protects the confidentiality of papers prepared by or on behalf of attorneys in the anticipation of litigation. Id. The purpose of the work product doctrine is to "promote[] the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients." Id. (citing Hickman v. Taylor, 329 U.S. 495 (1947)). Under the work product doctrine, a disclosure to a third party does not necessarily waive the doctrine's protection.

Discussing whether a disclosure constitutes a waiver of work product protection, the Westinghouse court distinguished between disclosure to adversaries and disclosures to non-

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<sup>1</sup> Based on the parties' submissions, it appears undisputed that the documents in question are work product. Thus, the only question remaining for the Court's consideration is whether Nielsen waived the protection afforded by the work product doctrine.

adversaries, as well as intentional and unintentional disclosure. "[W]hen the disclosure is either inadvertent or made to a non-adversary, it is appropriate to ask whether the circumstances surrounding the disclosure evidenced conscious disregard of the possibility that an adversary might obtain the protected materials." Id. at 1430 (emphasis added).

After reviewing the record in this case, the Court concludes that the facts and circumstances do not evidence that Nielsen consciously disregarded the possibility that an adversary like Student Finance could obtain the documents at issue. First, Nielsen disclosed the documents in question to its accountant of 29 years, Edward H. Baker, CPA, an individual who is not an adversary to Nielsen. Mr. Baker requested information to assist him in preparing Nielsen's annual audit and was given a file of documents, which contained various documents, as well as the letters and documents written by Nielsen's attorneys. The disclosure was made by a lay employee at Nielsen without knowledge and/or sanction of the attorneys who prepared the documents. Given the long-standing relationship between Nielsen and Baker and the fact that the documents at issue were turned over as part of a package of documents for the annual audit, it is evident that Nielsen expected these documents would be kept confidential and never envisioned that they could be turned over to Student Finance. Thus, if anything, the circumstances in this case, suggest that the disclosure by Nielsen was "unconscious"

within the context of the Westinghouse analysis. Accordingly, the Court concludes that Nielsen has not waived the work-product privilege, and therefore, the Court will deny Student Finance's Motion To Compel Production Of Documents.

#### **CONCLUSION**

For the reasons discussed, the Court will grant Student Finance's Motion For Reargument With Respect To Paragraph 2 Of The Court's September 29, 2000 Order and deny Student Finance's Motion To Compel Production Of Documents.

An appropriate Order will be entered.